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Returning to Work – Practical Issues Every Employer Needs to Consider

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As America prepares to return to work, employers are facing new human resources issues like never before. Some new situations require new solutions, but it is important that employers remember the basics still apply and often provide the best solution. This Alert, which is the third in a three-part series addresses several "new" issues employers will face as America reopens and employees return to work. Of course, those employers who are part of a Critical Infrastructure Sector have heroically soldiered on through the entire pandemic. Of the others, some have remained open but have had some or all employees working remotely, while others curtailed all or most operations. All employers who made changes will now "un-make" them, but those employers who experienced the most drastic changes to their operations since March also may experience the greatest "reopening" shocks in the coming weeks and months.

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The Childcare Conundrum

In many states, Governors' initial orders in mid-March included mandatory shutdowns of all public schools. Now, roughly two months later, almost all schools nationwide remain closed. Forty states have announced plans to remain closed for the remainder of the academic year (which usually ends in May or June), and as of May 4, 2020, not a single one had announced a specific reopening date. Traditional leave laws such as the federal Family and Medical Leave Act and state laws such as the California Family Rights Act provide for leave in connection with the birth or adoption of a child, or when a child has a serious health condition. But none of these anticipate a widespread school closure. In March, Congress enacted the Families First Coronavirus Response Act (FFCRA). A thorough description of that law's key provisions is available here, and Part Two of this series focused heavily on FFCRA's impact on reopening. Basically, employers of fewer than 500 employees must provide two weeks of paid sick leave and, if school closure requires them to provide care to their children, up to ten additional weeks of

partially-paid sick leave (up to $200 per day). Employers of fewer than 50 employees might be exempt, if to provide such leave would jeopardize the business' ability to go on.

During the pandemic, employers may or may not have had their employees utilize and exhaust these new emergency federal benefits (although all employers covered by the FFCRA are required to notify employees of these benefits). But even if they have been used, employees whose children are shut out of school or childcare will not necessarily be able to return to work just because the employer can reopen. Employers must be prepared to address situations on a case-by-case basis, recognizing that many states have laws against discrimination on the basis of family status.

If a reduction in business/revenue necessitates only a partial reopen, or a reopen with less than the full pre-pandemic complement of employees, some employees' need for a reduced schedule, or additional leave (possibly unpaid) might present an unexpected win-win. Another challenge discussed in Part 1 of this series—that of social distancing required to minimize or eliminate the spread of COVID-19—might be addressed by establishing multiple shifts to allow more employees to work without coming into contact with each other; this solution also could provide an opportunity for employees to work during non-school hours. Employers should also consider whether remote-working solutions utilized during the pandemic can be kept in place until school/daycare options become viable solutions again.

Other solutions may include reminding employees of existing benefits plans such as dependent care reimbursement for those who previously had not needed them, or creating new plans. Finally, employers with appropriate facilities could consider engaging a childcare provider to offer on-site services. Obviously, no single solution is "the answer" for every employer, but a combination of creative approaches can help employers provide options for the greatest number of employees while navigating the complex network of new and existing laws.

Vacation/Paid Time Off Exhaustion – "…But I've had this trip booked for months!"

During the COVID-19 related layoffs, furloughs, and shutdowns, many employees were focused on their immediate need for money to pay their bills, and employers worked hard to provide employees sources of income. In addition to numerous COVID-19-specific government provided financial sources designed to put money in the hands of employees, many employees tapped vacation or Paid Time Off (PTO) accounts for additional income. When those employees return to work, it is very likely that they will want to take time off for events or trips that they had planned long before COVID-19 turned lives upside down…and drained the vacation/PTO time they had planned to use for that event/trip. What obligations exist, and what options are available to employers, to deal with such a circumstance? Creative options include unpaid leaves of absence and "vacation/PTO debt," but as employers attempt to rebuild, hard decisions may need to be made, and each of these options comes with its own set of legal complexities. While every situation must be evaluated separately, a little planning and preparation now will pay dividends later.

Re-Employment – Legal Considerations and Best Practices

Of course COVID-19 has created its own set of return-to-work issues, but it is important that employers remember the basics as they prepare for employees to return to work. A first consideration is the employees' current employment status: are they still employed or were they actually terminated? Were they "furloughed" or "laid off," and, regardless of terminology, what were they told regarding their return-

to-work expectations? Employers will need to address actual or implied obligations to employees, which likely were made and communicated during the chaotic early days of the pandemic crisis, to make sure that claims of breach of contract do not arise.

Next, remember, long-established discrimination, retaliation, and privacy laws still apply. Decisions regarding re-employment, including return-to-work order (who comes back first, etc.), duties, wages, benefits, etc., must be carried out in accordance with applicable laws and based on legitimate, non-discriminatory/retaliatory grounds. Some states and cities have enacted "return-to-work" legislation mandating that seniority be followed even if the employer is non-union and has not had a seniority system.

Even then, COVID-19 throws another wrench in the mix – what about employees who were quarantined because they, or someone with whom they had close contact, tested positive for the virus? What are the legal considerations and best practices for dealing with those employees? Can they come back to work? Is the decision theirs or the employer's? If they can return but are reluctant to do so, what are the employer's options? If their co-workers react negatively to their return, what are employers' obligations to co-workers?

To conclude our Return To Work series, FordHarrison will be presenting a discussion of these and related issues in a complimentary webinar, "Returning to Work – Practical Issues Every Employer Needs To Consider," on May 15, 2020, at 2:00 (EST), to help get all of America back to work as safely and lawfully as possible. Please click here to register. If you have related questions regarding returning your employees to work, you can submit them on the registration form. Please submit them at least a day before the webinar. We will answer as many questions as time will permit.

If you have any questions regarding the issues addressed in this Alert, please contact the authors, Cory King, partner in our San Diego office at cking@fordharrison.com, and Jack Schaedel, partner in our Los Angeles office at jschaedel@fordharrison.com. Of course, you may also contact the FordHarrison attorney with whom you usually work.

This Series: This is the third in a three-part series of Alerts addressing issues employers face when reopening in the wake of the COVID-19 pandemic. Click here for the first Alert in this series, "Are You Ready to Reopen? Legal and Practical Issues to Consider." Click here for the second Alert in the series, "Reopening America – Employers Facing Paid Leave Issues Under the FFCRA." Click here to access recordings of the webinars for the first two parts of this series.

FordHarrison is closely monitoring the spread of Coronavirus and associated federal and state legislation and has implemented continuity plans, including the ability to work remotely in a technologically secure environment when necessary, to ensure continuity of our operations and uninterrupted service to our clients. We are following all CDC guidelines and state and local laws as applicable. We are committed to ensuring the health and welfare of our clients, employees, and communities while continuing to provide our clients with the highest quality service. Please see our dedicated Coronavirus Taskforce and Coronavirus – CARES Act pages for the latest FH Legal Alerts and webinars on Coronavirus and workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be

connected with a Coronavirus Taskforce or CARES Act attorney, please contact clientservice@fordharrison.com.